

# Death Penalty

## UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

FRANCIS HERNANDEZ,  
Petitioner,  
v.  
MICHAEL MARTEL,\*  
Acting Warden, California State  
Prison at San Quentin,  
Respondent.

CASE NO. CV 90-4638 RSWL  
**DEATH PENALTY CASE**  
ORDER RE OBJECTIONS

The parties have made various objections to evidence submitted as part of the evidentiary hearing. Many of these are not true evidentiary objections but objections to the arguments of counsel. The Court need not rule on these objections, as the Court has considered all of the arguments presented by the parties in addressing each claim. Having considered the parties' briefs, the Court hereby orders as follows:

1. Respondent's objection to the March 27, 1990 declaration of Dorothy Otnow Lewis as unreliable is **OVERRULED**. The declaration is admissible pursuant to Federal Rule of Evidence 703.

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\* Michael Martel is substituted for his predecessors as Acting Warden of the California State Prison at San Quentin, pursuant to Federal Rule of Civil Procedure 25(d).

1           2.     Respondent's objection to ¶ 34 of CDD<sup>1</sup> as "solely derived from" the  
2     March 27, 1990 declaration of Dr. Lewis is **OVERRULED**.

3     The Court has overruled respondent's objection to Dr. Lewis's declaration.  
4     Moreover, the record belies respondent's assertion that ¶ 34 is based only on  
5     information contained in Dr. Lewis's March 27, 1990 declaration.

6           3.     Petitioner's objection to CDNS<sup>2</sup> at 135:1-136:27 and  
7     Ex. 38 (P01149-1152) is **OVERRULED**.

8           4.     Petitioner's objection to CDNS at 132:24-133:5 and Ex. 38 (P3439-  
9     3443) is **OVERRULED**.

10          5.     Petitioner's objection to CDNS at 3:9-11 and 1 CDD 49 is  
11     **OVERRULED**.

12          6.     Petitioner's objection to CDNS 3:15-18 and 1 CDD 51, 52 is  
13     **OVERRULED**.

14          7.     Petitioner's objection to CDNS at 4:11-14, 1 CDD 56, 57 is  
15     **OVERRULED**.

16          8.     Petitioner's objection to CDNS at 4:15-17, 1 CDD 58 is  
17     **OVERRULED**.

18          9.     Petitioner's objection to CDNS at 6:19-9:17 and Ex. 38 (P00517-19)  
19     is **SUSTAINED** to the extent the evidence is offered to prove petitioner's mental  
20     state at the time of the crime.

21          10.    Petitioner's objection to CDNS at 9:18-24 and Ex. 38 (P01967-69) is  
22     **SUSTAINED** to the extent the evidence is offered to prove petitioner's mental  
23     state at the time of the crime.

24          11.    Petitioner's objection to CDNS at 9:25-10:7 and Ex. 38 (P00520-24)  
25     is **SUSTAINED** to the extent the evidence is offered to prove petitioner's mental  
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27     <sup>1</sup> CDD refers to the deposition of Charles Downing.

28     <sup>2</sup> CDNS refers to Charles Downing's Narrative Statement.

1 state at the time of the crime.

2 12. Petitioner's objection to CDNS at 11:4-18 and Ex. 38 (P0751) is  
3 **OVERRULED**.

4 13. Petitioner's objection to CDNS at 11:11-12:20 and Ex. 38 (P01213-  
5 16) is **SUSTAINED** to the extent that the evidence is offered to prove petitioner's  
6 mental state at the time of the crime.

7 14. Petitioner's objection to CDNS at 12:22-13:8 and Ex. 38 (P01210) is  
8 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
9 state at the time of the crime.

10 15. Petitioner's objection to Ex. 38 (P00814-15) is **SUSTAINED** to the  
11 extent that it is offered to prove petitioner's mental state at the time of the crime.

12 16. Petitioner's objection to CDNS at 14:7-15:20, 41:3-11, 138:6-27 and  
13 Ex. 38 (P00444-50) is **SUSTAINED** to the extent that the evidence is offered to  
14 prove petitioner's mental state at the time of the crime.

15 17. Petitioner's objection to CDNS at 15:22-18:6, 46:1010, 61:4-62:3  
16 and Ex. 38 (P00539-43, P00839-43) is **SUSTAINED** to the extent that the  
17 evidence is offered to prove petitioner's mental state at the time of the crime.

18 18. Petitioner's objection to CDNS at 18:7-23, 60:18-61:3 and Ex. 38  
19 (P00547-50) is **SUSTAINED** to the extent that the evidence is offered to prove  
20 petitioner's mental state at the time of the crime.

21 19. Petitioner's objection to CDNS at 18:24-19:4 and Ex. 38 (P00529-  
22 31) is **SUSTAINED** to the extent that the evidence is offered to prove petitioner's  
23 mental state at the time of the crime.

24 20. Petitioner's objection to CDNS at 19:15-20 and Ex. 38 (P00532-33)  
25 is **SUSTAINED** to the extent that the evidence is offered to prove petitioner's  
26 mental state at the time of the crime.

27 21. Petitioner's objection to CDNS at 19:21-20:8 and Ex. 38 (P0033) is  
28 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental

1 state at the time of the crime.

2 22. Petitioner's objection to CDNS at 20:9-18 and Ex. 38 (P00438) is  
3 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
4 state at the time of the crime.

5 23. Petitioner's objection to CDNS at 20:19-28 and Ex. 38 (P00504) to  
6 is **SUSTAINED** the extent that the evidence is offered to prove petitioner's mental  
7 state at the time of the crime.

8 24. Petitioner's objection to CDNS at 21:2-9 and Ex. 38 (P00215) is  
9 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
10 state at the time of the crime or his relationship with his parents.

11 25. Petitioner's objection to CDNS at 21:10-15 and Ex. 38 (P00228) to  
12 is **SUSTAINED** the extent that the evidence is offered to prove petitioner's mental  
13 state at the time of the crime.

14 26. Petitioner's objection to CDNS at 21:16-27 and Ex. L-1 (P00822-23)  
15 is **SUSTAINED** to the extent that the evidence is offered to prove petitioner's  
16 mental state at the time of the crime or his relationship with his parents.

17 27. Petitioner's objection to CDNS at 21:28-22:19 and Ex. 38 (P01067-  
18 76) is **SUSTAINED** to the extent that the evidence is offered to prove petitioner's  
19 mental state at the time of the crime or his relationship with his parents.

20 28. Petitioner's objection to CDNS at 20:20-24:19, 43:27-46:11 and  
21 Ex. 38 (P01096-1106) is **SUSTAINED** to the extent that the evidence is offered to  
22 prove petitioner's mental state at the time of the crime or his relationship with his  
23 parents.

24 29. Petitioner's objection to CDNS at 24:20-25:8 and Ex. 38 (P01109-  
25 1110) is **SUSTAINED** to the extent that the evidence is offered to prove  
26 petitioner's mental state at the time of the crime or his relationship with his  
27 parents.

28 30. Petitioner's objection to CDNS at 25:9-20, Ex. L-10 and Ex. 38

1 (P01086-88) is **SUSTAINED** to the extent that the evidence is offered to prove  
2 petitioner's mental state at the time of the crime or his relationship with his  
3 parents.

4 31. Petitioner's objection to CDNS at 25:21-26:5 and Ex. 38 (P00520-  
5 24) is **SUSTAINED** to the extent that the evidence is offered to prove petitioner's  
6 mental state at the time of the crime or his relationship with his parents.

7 32. Petitioner's objection to CDNS at 26:6-12 and Ex. 38 (P003441-  
8 3443) is **SUSTAINED** to the extent that the evidence is offered to prove  
9 petitioner's mental state at the time of the crime or his relationship with his  
10 parents.

11 33. Petitioner's objection to CDNS at 26:13-25, 136:28-37:12, Ex. 38  
12 (P01119) and 6 CDD 77-78 is **SUSTAINED** to the extent that the evidence is  
13 offered to prove petitioner's mental state at the time of the crime or his relationship  
14 with his parents.

15 34. Petitioner's objection to CDNS at 26:26-27:4 and Ex. P01121 is  
16 **SUSTAINED** to the extent the evidence is offered to prove petitioner's mental  
17 state at the time of the crime or his relationship with his parents.

18 35. Petitioner's objection to CDNS 134:20 -135:7 and Ex. 38 (P01127-  
19 28)  
20 is **SUSTAINED** to the extent that the evidence is offered to prove petitioner's  
21 father was not abusive but **OVERRULED** to the extent that the evidence is offered  
22 to prove whether counsel made a strategic decision.

23 36. Petitioner's objection to CDNS at 27:5-19 and Ex. 38 (P01133) is  
24 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
25 state at the time of the crimes or petitioner's relationship with his parents, but  
26 **OVERRULED** to the extent that the evidence is offered to prove whether counsel  
27 made a strategic decision.

28 37. Petitioner's objection to CDNS at 27:20-28:3 and Ex. 38 (P01134)

1 is **SUSTAINED** to the extent that the evidence is offered to prove petitioner's  
2 mental state at the time of the crimes or petitioner's relationship with his parents,  
3 but **OVERRULED** to the extent that the evidence is offered to prove whether  
4 counsel made a strategic decision.

5 38. Petitioner's objection to CDNS at 28:4-17 and Ex. 38 (P01135) is  
6 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
7 state at the time of the crimes or petitioner's relationship with his parents, but  
8 **OVERRULED** to the extent that the evidence is offered to prove whether counsel  
9 made a strategic decision.

10 39. Petitioner's objection to CDNS at 135:8-19, 6 CDD 87-88 and Ex.  
11 38 (P01139-40) is **SUSTAINED** to the extent that the evidence is offered to prove  
12 petitioner was not abused by his parents.

13 40. Petitioner's objection to CDNS at 135:21-36:27 and Ex. 38 (P01149-  
14 52) is **SUSTAINED** to the extent that the evidence is offered to prove petitioner's  
15 father was not abusive, but **OVERRULED** to the extent that the evidence is  
16 offered to prove whether trial counsel made a strategic decision.

17 41. Petitioner's objection to CDNS at 28:19-29:2, 137:13-21 and Ex. 38  
18 (P01153) is **SUSTAINED** to the extent that the evidence is offered to prove  
19 petitioner's mental state at the time of the crimes or petitioner's relationship with  
20 his parents, but **OVERRULED** to the extent that the evidence is offered to prove  
21 whether counsel made a strategic decision.

22 42. Petitioner's objection to CDNS at 137:23-28 and Ex. 38 (P01155) is  
23 **SUSTAINED** to the extent the evidence is offered to prove petitioner's mental  
24 state at the time of the crime or his relationship with his parents.

25 43. Petitioner's objection to CDNS at 29:3-10 and Ex. 38 (P01156) is  
26 **SUSTAINED** to the extent the evidence is offered to prove petitioner's mental  
27 state at the time of the crime or his relationship with his parents.

28 44. Petitioner's objection to CDNS at 29:11-16 and Ex. 38

1 (P01156) is **SUSTAINED** to the extent that the evidence is offered to prove  
2 petitioner's mental state at the time of the crimes or petitioner's relationship with  
3 his parents, but **OVERRULED** to the extent that the evidence is offered to prove  
4 whether counsel made a strategic decision.

5 45. Petitioner's objection to CDNS at 138:1-5 and Ex. 38 (P01158) is  
6 **SUSTAINED** to the extent the evidence is offered to prove petitioner's mental  
7 state at the time of the crime or that petitioner was not abused by his parents.

8 46. Petitioner's objection to CDNS at 29:17-21 and Ex. 38 (P01112) is  
9 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
10 state at the time of the crimes, but **OVERRULED** to the extent that the evidence is  
11 offered to prove whether counsel made a strategic decision.

12 47. Petitioner's objection to CDNS at 29:22-25 and Ex. 38  
13 (P01159-60) is **SUSTAINED** to the extent that the evidence is offered to prove  
14 petitioner's mental state at the time of the crimes, but **OVERRULED** to the extent  
15 that the evidence is offered to prove whether counsel made a strategic decision.

16 48. Petitioner's objection to CDNS at 29:26-30:6 and Ex. 38  
17 (P0163) is **SUSTAINED** to the extent that the evidence is offered to prove  
18 petitioner's mental state at the time of the crimes.

19 49. Petitioner's objection to CDNS at 138:28-139:10 and Ex. 38  
20 (P01170) is **SUSTAINED** to the extent the evidence is offered to prove that  
21 petitioner was not abused by his father.

22 50. Petitioner's objection to CDNS at 139:12-140:3 and Ex. 38  
23 (P01176) is **OVERRULED** to the extent the evidence is offered to prove whether  
24 counsel made a strategic decision.

25 51. Petitioner's objection to CDNS at 140:4-20 and Ex. 38  
26 (P01177-78) is **SUSTAINED** to the extent the evidence is offered to prove that  
27 petitioner was not abused by his father.

28 52. Petitioner's objection to CDNS at 140:21-141:3 and Ex. 38



1 (P01179-80) is **OVERRULED** to the extent the evidence is offered to prove  
2 whether counsel made a strategic decision.

3 53. Petitioner's objection to CDNS at 141:4-142:3 and Ex. 38  
4 (P01181-82) is **SUSTAINED** to the extent that the evidence is offered to prove  
5 petitioner's father did not abuse petitioner, but **OVERRULED** to the extent that  
6 the evidence is offered to prove whether counsel made a strategic decision.

7 54. Petitioner's objection to CDNS at 142:4-12 and Ex. 38  
8 (P01187) is **SUSTAINED** to the extent that the evidence is offered to prove  
9 petitioner's parents did not abuse petitioner.

10 55. Petitioner's objection to CDNS at 142:13-19 and Ex. 38  
11 (P01193-94) is **SUSTAINED** to the extent that the evidence is offered to prove  
12 petitioner's parents did not abuse petitioner.

13 56. Petitioner's objection to CDNS at 30:7-11 and Ex. 38  
14 (P01195) is **SUSTAINED** to the extent that the evidence is offered to prove  
15 petitioner's mental state at the time of the crimes, but **OVERRULED** to the extent  
16 that the evidence is offered to prove whether counsel made a strategic decision.

17 57. Petitioner's objection to CDNS at 142:21-26 and Ex. 38  
18 (P01198) is **SUSTAINED** to the extent that the evidence is offered to prove that  
19 petitioner's parents did not abuse petitioner.

20 58. Petitioner's objection to CDNS at 142:27-143:13 and Ex. 38  
21 (P01199-01) is **SUSTAINED** to the extent that the evidence is offered to prove  
22 that petitioner's parents did not abuse petitioner.

23 59. Petitioner's objection to CDNS at 30:12-16 and Ex. 38  
24 (P01204-05) is **SUSTAINED** to the extent that the evidence is offered to prove  
25 petitioner's mental state at the time of the crimes or petitioner's relationship with  
26 his parents, but **OVERRULED** to the extent that the evidence is offered to prove  
27 whether counsel made a strategic decision.

28 60. Petitioner's objection to CDNS at 143:14-20 and Ex. 38



1 (P01208) is **OVERRULED** to the extent the evidence is offered to prove whether  
2 counsel made a strategic decision.

3 61. Petitioner's objection to CDNS at 30:17-27 and Ex. 38 (P01211) is  
4 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
5 state at the time of the crimes or petitioner's relationship with his parents.

6 62. Petitioner's objection to CDNS at 143:21-45:20, 26 and Ex. 38  
7 (P01212-13) is **SUSTAINED** to the extent that the evidence is offered to prove  
8 petitioner's mental state at the time of the crimes or petitioner's relationship with  
9 his parents, but **OVERRULED** to the extent that the evidence is offered to prove  
10 whether counsel made a strategic decision.

11 63. Petitioner's objection to CDNS at 30:28 and Ex. 38 (P0842) is  
12 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
13 state at the time of the crime.

14 64. Petitioner's objection to CDNS at 31:13-26 and Ex. 38 (P00842-43) is  
15 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
16 state at the time of the crime.

17 65. Petitioner's objection to CDNS at 31:27-32:17 and Ex. 38 (P0886-87)  
18 is **SUSTAINED** to the extent that the evidence is offered to prove petitioner's  
19 mental state at the time of the crime.

20 66. Petitioner's objection to CDNS at 32:18-24 and Ex. 38 (P01602) is  
21 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
22 state at the time of the crime.

23 67. Petitioner's objection to CDNS at 32:25-33:4 and Ex. 38 (P01977) is  
24 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
25 state at the time of the crime.

26 68. Petitioner's objection to CDNS at 33:5-13 and Ex. 38 (P00317) is  
27 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
28 state at the time of the crime.

1           69. Petitioner's objection to CDNS at 33:14-34:2 and Ex. 38 (P00324) is  
2 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's mental  
3 state at the time of the crime.

4           70. Petitioner's objection to CDNS at 34:3-20 and Ex. 38 (P00376) is  
5 **SUSTAINED** to the extent that the evidence is offered to prove petitioner's  
6 mental state at the time of the crime.

7           80. Petitioner's objection to 5 CDD 6 is **SUSTAINED** to the extent that  
8 the evidence is offered to prove petitioner's mental state at the time of the crime,  
9 but **OVERRULED** to the extent the evidence is offered to prove whether counsel  
10 made a strategic decision.

11           81. Petitioner's objection to CDNS at 39:22-40:10, 6 CDD 43-45 and Ex.  
12 38 (P00886) is **SUSTAINED** to the extent that the evidence is offered to prove  
13 petitioner's mental state at the time of the crime, but is **OVERRULED** to the  
14 extent the evidence is offered to prove whether counsel made a strategic decision.

15           82. Petitioner's objection to 2 CDD 10 is **SUSTAINED** to the extent that  
16 the evidence is offered to prove that petitioner's parents did not abuse him.

17           83. Petitioner's objection to 11 CDD 119 is **OVERRULED** to the extent  
18 that the evidence is offered to prove whether counsel made a strategic decision.

19           84. Petitioner's objection to CDNS at 86:17-87:9 is **OVERRULED** to  
20 the extent that the evidence is offered to prove whether counsel made a strategic  
21 decision.

22           85. Petitioner's objection to CDNS at 88:7-24 is **SUSTAINED**.

23           86. Petitioner's objection to Ex. 38 (P00887) is **SUSTAINED** to the  
24 extent that the evidence is offered to prove petitioner's mental state at the time of  
25 the crime.

26           87. Petitioner's objection to 4 CDD 62-65 is **OVERRULED** to the extent  
27 the evidence is offered to prove counsel made a strategic decision.

28           88. Petitioner's objection to CDNS at 100:1-6 is **OVERRULED**.

1           89. Petitioner's objection to 6 CDD 26, 27 is **OVERRULED** to the  
2 extent that the evidence is offered to prove whether counsel made a strategic  
3 decision.

4           90. Petitioner's objection to CDD Ex. 4 (P00330) is **OVERRULED** to  
5 the extent that the evidence is offered to prove whether counsel made a strategic  
6 decision.

7  
8           91. Petitioner's objection to CDD Ex. 38 (P00330) is **OVERRULED**.

9           92. Petitioner's objection to CDD Ex. L-1 (P00446) is **OVERRULED**.

10          93. Petitioner's objection to CDD Ex. 38 (P01968) is **OVERRULED**.

11          94. Petitioner's objection to 4 CDD 56, CDD Ex. 38 (P00346-47) is  
12 **OVERRULED**.

13          95. Petitioner's objection to 2 CDD 68-73, 76; 3 CDD 6, 12-14, CDD Ex.  
14 38 (P00196) is **OVERRULED**.

15          96. Petitioner's objection to CDNS at 152:3-12 is **SUSTAINED** to the  
16 extent that the evidence is offered to prove that petitioner was not abused by his  
17 parents.

18          97. Petitioner's objection to 3 CDD 16-19, 24-25 and CDD Ex. 38  
19 (P00210) is **SUSTAINED** to the extent that the evidence is offer to prove  
20 petitioner's parents were not abusive.

21          98. Petitioner's objection to CDD Ex. 38 (P01096-11) is **SUSTAINED**.

22          99. Petitioner's objection to 8 CDD 74 is **OVERRULED**.

23          100. Respondent's objection to Wagner Depo. at 25:6-22, 26:19-24 is  
24 **SUSTAINED**.

25          101. Respondent's objection to State Petition, Ex. D is **SUSTAINED**.

26          102. Respondent's objection to Wagner Depo. at 23:15-24:21 is  
27 **SUSTAINED**.

28          103. Respondent's objection to Wagner Depo. at 40:19-41:13 is

1 **SUSTAINED.**

2 104. Respondent's objection to Wagner Depo. Ex. I, ¶ 2 is **SUSTAINED.**  
3 The statement, "I told him that I was agonizing over the fact that I had to make a  
4 decision that could mean life or death for the individual on trial," is admissible to  
5 show what happened outside the jury room but is inadmissible for the truth of the  
6 matter asserted.

7 105. Respondent's objection to McClister-Jasinski Depo., Ex. B, ¶ 2 is  
8 **SUSTAINED.**

9 106. Respondent's objection to Lamont-Soliman Depo. at 23:5-8 is  
10 **SUSTAINED.**

11 107. Respondent's objection to Wagner Depo. at 41: 12-13 is  
12 **SUSTAINED.**

13 108. Respondent's objection to Wagner Depo. at 40:19-41:13 is  
14 **SUSTAINED.**

15 109. Respondent's objection to Wagner Depo. at 23:17-20 is  
16 **SUSTAINED.**

17 110. Respondent's objection to Wagner Depo. at 23:23-24, 24:1-21 is  
18 **SUSTAINED.**

19 111. Respondent's objections to the declarations of Martin Brandfon, Vikki  
20 Schummer and William Gailey, including paragraph 8 of Martin Brandfon's  
21 declaration, are **SUSTAINED.**

22 **IT IS SO ORDERED.**

23 Dated: August 16, 2011.

24  
25 RONALD S.W. LEW

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Ronald S. W. Lew  
27 United States District Judge  
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